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No. 94-1356

In the

Supreme Court of the United States

October Term, 1994

ROBERT GABLE, HARVEY SPIES, JOHN FOLEY, and EUGENE FOREMAN, on behalf of themselves and as representatives of a class of persons similarly situated,
Petitioners,

v.

SWEETHEART CUP COMPANY, INC., SWEETHEART HOLDINGS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The petition for a writ of certiorari presents two questions for the Court's review. The first is whether, as the Fourth Circuit held, a standard of clear and unambiguous waiver should be applied to determine whether an employer has agreed to provide lifetime health benefits, and the second is what sort of evidence should be considered if the employer has made such a promise.

Respondents seek to reformulate the question presented in a way that focuses on the second question, but ignores the first question. In this they are joined by retiree health benefit claimants from another employer who recognize how far the Fourth Circuit's waiver analysis strays from the approaches taken by other circuits,

but who apparently would prefer to have their case be the one in which these issues are decided.

1. Respondents and their *amici* contend that, even if the record in this case were considered according to the proper legal principles, respondents would still prevail on summary judgment. However, as the petition amply shows, even when considered by itself, the insurance policy that respondents treated as the plan document promised retirees that their helath coverage would continue after retirement, and that, after the retiree's death, such coverage would continue "for the lifetime of the dependent spouse." Moreover, the policy's provision for cancellation by agreement between the insurer and the employer could easily have been read only to give the employer the option of shifting to another insurer, rather than holding out the possibility that the "lifetime" benefit was really only a benefit for however long the employer wanted to continue it. Accordingly, this language created sufficient ambiguity to warrant an examination of extrinsic evidence, even if the "Schedule II" documents, *see infra*, and the plan brochures that took the place of Summary Plan Descriptions for this Plan, are not considered as among the plan documents whose texts may be considered in deciding whether to reach the extrinsic evidence.

The Petition describes much of the evidence in the record that supports a finding of ambiguity, and because respondents do not take issue with any of these specific pieces of evidence, there is no reason to discuss that point further in this reply brief. More important is the fact that the court below did not apply those principles, and the principles that it did apply are so clearly at variance with those of other lower courts that this Court should grant certiorari to determine how these cases should be analyzed.

Whether the Court then reviews the very extensive record itself to decide the case, once those principles have been adopted, *cf. Caterpillar v. Williams*, 482 U.S. 386 (1987), or whether it remands to the lower courts to apply the rules in the first instance, *e.g.*, *Curtiss-Wright Corp. v. Schoonejongen*, No. 93-1935 (March 6, 1995), the burgeoning disagreements among the lower courts about how to analyze retiree health benefit claims like those of petitioners should impel this Court to grant certiorari to decide both of the questions presented in the petition.

2. Respondents attempt to show that the Fourth Circuit is in the mainstream of the circuits that have considered allegations that an employer has made a vested promised to provide health benefits to retirees. Respondents do this by making the following statement, followed by a string citations, at page seven of their opposition:

> Employers may, however, agree to provide vested lifetime benefits. Because such agreements exceed ERISA's requirements, **they must be written explicitly into a plan.** [citations]. . . . [S]uch extra-ERISA commitments **may not be lightly inferred**. The burden of proving the intent to vest benefits rests squarely on the Petitioners.

Thus, respondents argue, the Fourth Circuit's requirement of an unambiguous commitment is in complete harmony with the other lower federal courts.

In fact, however, none of the cases cited suppport the propositions stated in bold. They stand instead for the uncontroversial proposition that the vesting of benefits must be part of the agreement, and that the agreement must be embodied in the written plan documents. But they also recognize, for example, that the vesting of benefits may be inferred rather than express, and that the courts may apply a variety of presumptions in determining whether the agreement contains the promise of vesting. *See In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986), cited by respondents at 7.

Respondents' *amici*, by contrast, acknowledge that the Fourth Circuits waiver analysis is plainly wrong, but purport to find the court's "precise holding" in its reliance on the general reservation of the right to amend (the "modification clause") in the insurance policy. Salaried Retirees Br. 3, citing Pet. App. 8a. But even the precise holding that they cite states that this modification clause "defeat[s] plaintiff's claim that the company . . . waived its statutory right to modify or terminate the health benefit plan." Pet. App. 8a.

Respondents also contend that the Sixth Circuit does not apply its precedent in *UAW v. Yard-Man*, 716 F.2d 1476 (1983),

outside the collective bargaining context. Mem. 10-11. In fact, however, that court continues to invoke *Yard-Man* to support the drawing of inferences and the making of presumptions in such non-collective-bargaining cases as *In re White Farm Equip. Co.*, 788 F.2d 1186, 1192, 1193 (6th Cir. 1986).

3. Respondents take issue with petitioners' reliance on the "Schedule II" documents, which, as respondents acknowledge, contained express promises that retirees would receive health benefits for the duration of their lifetimes, on the theory that they are only "informal writings" rather than part of the plan. Respondents do not dispute that summary plan descriptions ("SPD's") may be examined as a form of official plan documents in determining whether there is sufficient ambiguity to warrant consideration of extrinsic evidence. However, respondents continue, the Schedule II's are too informal to be considered plan documents, do not contain enough details to meet the requirements to be considered an SPD, and were not filed with the Labor Department as SPD's must be.

However, it was respondents themselves who, in the "Schedule III" papers which they chose to provide to beneficiaries, described the Schedule II's as "the official record of Benefit Entitlement." Petition at 6. And it is surely unseemly for respondents to rely on their failure to provide **any** plain-English explanation of their employees' benefit entitlements, as ERISA required them to do, in arguing that neither plan brochures nor the Schedule II's, which come the closest to being the SPD's that respondents were supposed to provide, may be given the same consideration as an SPD would be in determining whether respondents made a commitment to provide health benefits to their retirees.

Finally, respondents object to the petition's attack on the Fourth Circuit's reliance on the 1986 SPD to vitiate rights that, we argue, had been vested when the last member of the class retired in 1985. According to respondents, the 1986 SPD adequately communicated their change of heart concerning the permanence of these promises, and the district court gave individual class members the opportunity to show that they did not, in fact, receive the 1986 SPD and relied to their detriment on the absence of such notification. Mem. 13-14. But petitioners' point is not that there was some defect in the 1986 SPD or in the mailing list to which

it was sent — that issue was raised below, but is not repeated here. To the contrary, petitioners object to the fact that the Fourth Circuit, in stark disagreement with the Eighth Circuit in *Jensen v. SIPCO*, 38 F.3d 945 (1994), *cert. pending*, No. 94-1360, was willing to give any consideration at all to SPD's issued after the petitioners had retired.[1]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] In this regard, we cannot agree with *amici* Salaried Retirees that the petition does not present the conflict with *Jensen*. Respondents, for their part, do not respond to the portion of *Jensen* on which petitioners rely to show a conflict; they address only the part of the opinion that deals with the ambiguity in the documents issued before the class retired.